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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. KEITH DARNELL JOHNSON, Defendant and Appellant.	C043104 (Super. Ct. No. 01F07872)

A jury convicted defendant Keith Darnell Johnson of kidnapping (Pen. Code, § 207, subd. (a); all unspecified statutory references are to the Penal Code), forcible penetration with a foreign object (§ 289, subd. (a)(1)), sexual battery (§ 243.4, subd. (a)), assault with intent to commit rape (§ 220), and assault with intent to commit oral copulation (§ 220). With respect to the forcible penetration, the jury found three special circumstances under the one strike law: (1) defendant kidnapped the victim and the movement substantially increased the risk of harm above the level necessarily inherent in the sex offense; (2) he personally used a deadly or dangerous

weapon in commission of the offense; and (3) he tied or bound the victim. (§ 667.61, subds. (d)(2), (e)(4), (e)(6).) With respect to each of the remaining offenses, the jury sustained weapon enhancements based on defendant's use of a deadly or dangerous weapon. (§ 12022, subd. (b)(1).)

For his conviction on the count alleging forcible penetration, the trial court sentenced defendant to state prison for 25 years to life under the one strike law. (§ 667.61.)

The jury sustained a weapon enhancement (§ 12022.3, subd. (a)) that attached to the count for which the court sentenced defendant under the one strike law. The trial court stayed this enhancement.

The trial court imposed a prison sentence for kidnapping even though a kidnapping special circumstance had been charged and proven under the one strike law. The court found it unnecessary to use this special circumstance because the remaining circumstances were sufficient to support the one strike sentence. (See § 667.61, subd. (f) [if minimum number of circumstances is established "any other additional circumstance or circumstances shall be used to impose any punishment or enhancement authorized under any other law"].)

For the remaining offenses, the court imposed consecutive terms totaling 12 years.

On appeal, defendant claims: (1) all the weapon enhancements should have been stayed because his use of a weapon was one of the special circumstances supporting the one strike sentence of 25 years to life; (2) his sentence for kidnapping

should have been stayed pursuant to section 654; and (3) that his sentence to the upper term on count two and his consecutive sentences violate the rule of *Blakely v. Washington* (2004) 542 U.S. ___ [159 L.Ed.2d 403, 413-414] (*Blakely*). Having concluded that none of these claims are persuasive, we affirm the judgment. A brief summary of the unusual facts relating to this prosecution will be sufficient for an understanding of the issues presented.

FACTS AND PROCEEDINGS

After luring the 16-year-old victim to the open door of an apartment, defendant grabbed her, put a knife to her throat, and told her he would kill her if she screamed. He then told her to go into the apartment and she did. Initially, defendant told the victim to sit on the couch, but when she refused to do so, he told her to go into the bedroom. In the bedroom he forced her onto the bed and tied her hands behind her back. He used her cell phone, and at one point, called his sister and made the victim ask his sister if she had any sugar. Defendant untied the victim's hands and forced her to accompany him to his sister's apartment, where he made the victim retrieve a baby bottle filled with sugar that had been left outside the front door.

Defendant took the victim back to the bedroom of the first apartment and said he was going to "violate" her, observing: "[T]he least you can do is jerk me off." The victim did not respond, and defendant said he was going to tie her up but would

let her go if she could free herself. The victim resisted as defendant tied her up, but when he finished she was able to free herself in his presence. Defendant said he would tie her up again because he had not done it right the first time, and he said he would teach her a lesson about talking to strangers. After the victim freed herself again, defendant retied her more than 10 times. Each time the victim was able to free herself. Defendant laughed as he was tying the victim up and as she pleaded with him to let her go.

At some point during the day, defendant said he should "get something out of it" and reiterated that she could at least "jerk [him] off." Although the victim admitted to difficulty remembering the precise sequence of events, she testified that defendant committed a series of sexual assaults or attempted sexual assaults during their lengthy encounter. At one point, defendant threatened her with the knife, removed her pants while her hands were bound, and pushed her onto the bed. He then pulled her underwear down partway and looked at her vagina, before pulling her underwear back up. He subsequently touched her thighs, stomach, and breasts. He said he wanted to touch her vagina and asked her to moan, but she initially refused.

Defendant blindfolded the victim and rubbed her vagina through her underwear, and the victim moaned. She subsequently felt his penis rub against her thigh. She screamed and was able to free her hands and remove the blindfold. Defendant pulled up his pants, and the victim grabbed the knife he had left on the

bed. Defendant took the knife from her, but he grabbed it by the blade and cut his hand.

Defendant left the bedroom and returned with a towel and a black case that he said contained a gun. He threatened to shoot her if she did "that" again. He said there were two bullets: one for her and one for him. Defendant tied the victim's hands and forcibly inserted his fingers into her vagina. After moving her to another bedroom in the apartment for a short time, defendant locked her in a closet for a number of hours.

After letting the victim out of the closet, defendant still had the knife he had used to threaten her with earlier. He tried to force the victim to orally copulate him, but he stopped when she threatened to bite him. Defendant also tried unsuccessfully to have sexual intercourse with her. Eventually, he let her leave.

DISCUSSION

I

The Weapon Enhancements

Defendant claims each of the weapon enhancements should have been stayed because his use of a weapon was one of the special circumstances supporting the one strike sentence of 25 years to life. Defendant's argument is premised on section 667.61, subdivision (f), which provides in pertinent part: "If only the minimum number of circumstances specified in subdivision (d) or (e) which are required for the punishment provided in subdivision (a) or (b) to apply have been pled and

proved, that circumstance or those circumstances shall be used as the basis for imposing the term provided in subdivision (a) or (b) *rather than being used to impose the punishment authorized under any other law, unless another law provides for a greater penalty*." (Italics added.) In defendant's view, this precludes use of a weapon enhancement for any of the other offenses. We disagree.

The special circumstances in section 667.61 that relate to the manner in which an offense is committed attach to individual counts, and the same circumstance may therefore apply to more than one count. (See *People v. DeSimone* (1998) 62 Cal.App.4th 693, 697; see also § 667.61, subd. (g) ["[t]erms for other offenses committed during a single occasion shall be imposed as authorized under any other law, including Section 667.6, if applicable"].) This is consistent with case law recognizing that special circumstances described in section 667.61, including the weapon circumstance at issue, are the functional equivalent of ordinary conduct enhancements, which increase the punishment for the underlying offense because of conduct that makes the underlying offense more dangerous, which conduct is not an element of that offense. (See *People v. Alvarado* (2001) 87 Cal.App.4th 178, 197.) As such, use of the special circumstance of the use of a weapon to invoke the provisions of section 667.61 did not preclude a weapon enhancement on the other counts.

II

Kidnapping

Defendant argues that "the punishment for kidnap should have been stayed pursuant to section 654 because the facts of this case indicate the kidnap was incidental to one objective, the commission of the sex offenses." We disagree.

"Section 654 provides that even though an act violates more than one statute and thus constitutes more than one crime, a defendant may not be punished multiple times for that single act. [Citations.] The 'act' which invokes section 654 may be a continuous '"course of conduct" . . . comprising an indivisible transaction . . . .' [Citation.] 'The divisibility of a course of conduct depends upon the intent and objective of the defendant. . . . [I]f the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.'" (*People v. Akins* (1997) 56 Cal.App.4th 331, 338-339.) The determination of whether there was more than one objective is a factual determination, which will not be overturned on appeal unless substantial evidence does not support it. (*Id.* at p. 339.) The trial court's findings need not be explicit. (See *People v. McCoy* (1992) 9 Cal.App.4th 1578, 1585.)

Here, the evidence supports a finding that the crime of kidnapping was not done for the sole objective of committing the sexual offenses. In fact, the jury acquitted defendant of a charge of kidnapping to commit rape and found him guilty of only the lesser included offense of simple kidnapping. Thus, it appears the jury itself was not convinced that the motive for the kidnapping was the sexual offenses, which is not surprising under the circumstances. Defendant forced his victim up the stairs to his apartment at knifepoint. And, although a number of sexual offenses thereafter ensued, defendant kept the victim for many hours and his conduct was at times ambiguous, bizarre, and not directly related to the commission of sexual offenses. For example, defendant had victim accompany him to get sugar. And he later toyed with her by repeatedly tying her up to see if she could untie herself. We find that the kidnapping was independent of and not incidental to the sexual offenses and, as such, not subject to the provisions of section 654.

III

Blakely Error

The trial court sentenced defendant to the upper term of six years in prison for the crime of assault with intent to commit rape (count four) and to consecutive terms of imprisonment for kidnapping (count one), sexual battery by restraint (count three), and assault with intent to commit oral copulation (court five).

Relying on *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*) and *Blakely, supra,* 542 U.S. at p. ___ [159 L.Ed.2d at pp. 413-414], defendant claims the trial court erred in imposing the upper term on count four because the court relied upon facts not submitted to the jury and proved beyond a reasonable doubt, thus depriving him of the constitutional right to a jury trial on facts legally essential to the sentence. For the same reasons and again relying on *Apprendi* and *Blakely*, defendant claims the trial court erred in imposing a consecutive sentence on counts one, three, and five.

A. Forfeiture of claims

Before discussing the merits of defendant's contentions, we must address the People's argument that defendant has forfeited his claim that he has been denied his right to a jury trial and to proof beyond a reasonable doubt by failing to assert them in the trial court. We cannot agree.

"To protect against inappropriate incursions on a defendant's exercise or waiver of a fundamental constitutional right, such as that to jury trial, the federal Constitution long has been construed as requiring procedural safeguards, such as the requirement that a waiver of the right in question be made by the defendant personally and expressly. (See, e.g., *Brookhart v. Janis* (1966) 384 U.S. 1, 7-8 [a defendant personally must waive the right to plead not guilty, because that right encompasses the right to jury trial, the right to confront opposing witnesses, and the privilege against self-incrimination]; *Johnson v. Zerbst* [(1938)

304 U.S. 458, 464-465][a defendant expressly must waive Sixth Amendment right to assistance of counsel]; *Aetna Insurance v. Kennedy* (1937) 301 U.S. 389, 393-394 [a defendant expressly must waive right to trial by jury in a civil case]; *Patton* [*v. United States* (1930) 281 U.S. 276, 308-312][a defendant expressly must waive right to trial by jury].) With respect to the particular fundamental constitutional right to a jury trial, moreover, our state Constitution explicitly requires the defendant's personal and express waiver in open court. (Cal. Const., art. I, § 16; [*People v.*] *Ernst* (1994) 8 Cal.4th 441, 445; *In re Tahl* (1969) 1 Cal.3d 122, 131 (*Tahl*); *People v. Holmes* (1960) 54 Cal.2d 442, 443-444 (*Holmes*).)" (*People v. Collins* (2001) 26 Cal.4th 297, 307-308.) Such waiver cannot be implied from defendant's conduct. (*Holmes, supra,* at pp. 443-444.) Defendant, not having expressly waived his right to a jury trial on the facts related to sentencing, is not barred from claiming it here.

We recognize that the above authorities speak in terms of "waiver" and that there has been a recognition that, technically, "waiver" and "forfeiture" are different concepts. (See *United States v. Olano* (1993) 507 U.S. 725, 733 [123 L.Ed.3d 508, 519].) Even so, given the fundamental, constitutional nature of the right to a trial by jury, we can find no room to say that a right that cannot be waived by implication can, however, be forfeited by inaction.

The People also claim defendant's claims are not cognizable on appeal given the California Supreme Court's holding in *People v. Scott* (1994) 9 Cal.4th 331 (*Scott*). Again, we cannot agree.

First, while our Supreme Court held in *Scott* that a defendant's failure to object in the trial court to a sentence based on flawed information waived the claim on appeal, the Court did so on the theory that requiring an objection in the trial court was necessary in order to insure the prompt correction of error at the trial court level and to reduce the number of claims in the appellate court and, to that extent, preserve judicial resources.

Given what had been the longstanding rule in California at the time of this sentencing that there was no constitutional right to a jury trial in connection with a court's imposition of consecutive sentences and the fact that there was no published case holding that the rule was any different when the question was imposition of a sentence to an upper term (*People v. George* (2004) 122 Cal.App.4th 419), an objection in the trial court on Sixth Amendment grounds almost certainly would have been denied and the error would not have been corrected there. Futile objections are generally not required. (*People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648.)

Moreover, we note that in *Scott*, even though the Supreme Court by its holding established a rule requiring an objection to sentencing irregularities in the trial court, the high court did not apply its newly announced requirement to the case it was then considering because, the high court reasoned, "it appears that sentencing hearings have been conducted in a manner that has discouraged, disallowed, and discounted objections to the type of claims raised by defendant." (*Scott, supra,* 9 Cal.4th

at pp. 357-358.) Continuing, the high court held that "[b]ecause our holding effectively changes the circumstances under which such claims are litigated, and may require substantial practical alterations in the way sentencing proceedings are routinely conducted" (*Id.* at p. 358), its decision did not apply to cases in which the sentencing hearing was held before the decision in *Scott* became final. (*Ibid.*) *Scott* does not support the People's argument and the issue whether defendant had a right to a jury trial on one or more of the facts relied upon by the trial court in assessing the upper term or ordering consecutive sentences was not waived by defendant's failure to raise it in the trial court.

While the remaining cases the People cite on the issue of forfeiture stand for the general proposition that a constitutional right, or any other right may be forfeited by failing to raise it in the trial court, none of those cases spoke directly to the right to a jury trial and proof beyond a reasonable doubt.

B. The upper term of imprisonment

Applying the Sixth Amendment to the United States Constitution, the United States Supreme Court held in *Apprendi* that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Apprendi, supra,* 530 U.S. at p. 490 [147 L.Ed.2d at p. 455].) In *Blakely*, the Supreme Court held that, for this purpose, the statutory maximum is the maximum sentence that a court could impose based solely on facts reflected

by a jury's verdict or admitted by the defendant. Thus, when a sentencing court's authority to impose an enhanced sentence depends upon additional fact findings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts.

Under California's determinate sentencing law, the punishment for most offenses is expressed as a sentence range consisting of an upper, middle, and lower term. The selection of the term to be imposed is made by the trial court, applying the sentencing rules of the Judicial Counsel. (Pen. Code, § 1170, subds. (a)(3), (b).)

The court "shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." (Pen. Code, § 1170, subd. (b).) The sentencing rules set forth a nonexclusive list of circumstances, which may be considered in aggravation and mitigation. (Cal. Rules of Court, rules 4.408, 4.421, 4.423.) Notably, "[a] fact that is an element of the crime shall not be used to impose the upper term." (Cal. Rules of Court, rule 4.420(d).)

Together, the Penal Code and the sentencing rules of the Judicial Council create a sentencing scheme in which (1) there is a presumption in favor of the middle term, (2) the presumption can be overcome in favor of the upper term only if at least one circumstance in aggravation is found to be true, and (3) the elements of the offense cannot be considered as aggravating factors.

In most instances, a jury verdict or a defendant's plea will reflect only the elements of the offense. In such cases, the statutory middle term is "the maximum sentence a judge may impose

solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Blakely, supra,* 542 U.S. at p. ___ [159 L.Ed.2d at p. 413], italics omitted.) Accordingly, imposition of the upper term in such cases falls squarely within the holding of *Blakely*, and the defendant is entitled to a jury trial on facts, other than a prior conviction, used to increase the penalty beyond the statutory maximum that could be imposed based solely on facts reflected by the jury's verdict or admitted by the defendant.

Here, the trial court cited four reasons for imposing the upper term: (1) that defendant engaged in acts of extreme mental cruelty toward the victim; (2) that the manner in which the crimes were committed indicated that defendant had engaged in a significant degree of planning; (3) that defendant was on formal probation at the time of the offenses; and (4) that the victim was vulnerable.

None of those facts was submitted to the jury and proved beyond a reasonable doubt. We hold that the trial court's reliance on facts (1), (2) and (4) was error.

However, the trial court's reliance on the fact that defendant was on probation at the time he committed these offenses was, constitutionally, appropriate. "Because [the fact of probation] arises out of the fact of a prior conviction and is so essentially analogous to the fact of a prior conviction, we conclude that constitutional considerations do not require that matter to be tried to a jury and found beyond a reasonable doubt. As with a prior conviction, the fact of the defendant's status as a probationer arises out of a prior conviction in which a trier of

fact found (or the defendant admitted) the defendant's guilt as to the prior offense. [Citations.] As with a prior conviction, a probationer's status can be established by a review of the court records relating to the prior offense. Further, like a prior conviction, the defendant's status as a probationer '"does not [in any way] relate to the commission of the offense, *but goes to the punishment only* . . . ."' (*Almendarez-Torres v. U.S.* (1998) 523 U.S. 224, 244, italics in original.) Thus, in accordance with the analysis of *Blakely*, the trial court was not required to afford [defendant] the right to a jury trial before relying on his status as a probationer at the time of the current offense as an aggravating factor supporting the imposition of the upper term." (*People v. George*, *supra*, 122 Cal.App.4th at p. 426; see *People v. Thomas* (2001) 91 Cal.App.4th 212, 216-223.)

Even though the trial court erred in considering facts not found by the jury other than the fact of defendant's probationary status when the crimes were committed, that error is not fundamental error requiring reversal per se. In *United States v. Cotton* (2002) 535 U.S. 625 [152 L.Ed.2d 860], a case decided after the Court's decision in *Apprendi*, the Supreme Court unanimously held that a defendant's failure to object to *Apprendi* error in the trial court forfeits the right to raise it on appeal if the error did not seriously affect the fairness, integrity, and public reputation of the judicial proceedings, i.e., if a factor relied upon by the trial court in violation of *Apprendi* was uncontroverted at trial and supported by

overwhelming evidence. (*Cotton, supra,* 535 U.S. at p. 631 [152 L.Ed.2d at p. 868].)

Although the degree to which *Cotton* applies to California law may be debated, it stands at least for the proposition that *Apprendi*, and, by extension, *Blakely* error is not so fundamental that it requires reversal of a sentencing decision in all circumstances. It is appropriate therefore to consider the effect of the error on the sentencing proceedings to determine whether the error can be deemed harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Given the fact that defendant was on probation at the time of the current offenses and had been convicted of felony possession of a controlled substance in 2001 (the offense for which he had been placed on probation), a matter that could be relied on in the event this matter was remanded for sentencing on court four, and given the number and nature of the offenses of which he has been found guilty in this proceeding, we conclude there is no reasonable likelihood the trial court would have adjudged a lesser sentence on count four had it not considered the facts of extreme mental cruelty, planning, and the victim's vulnerability. The court's error was harmless beyond a reasonable doubt.

C. Consecutive sentences

As noted earlier, defendant also contends the trial court's determination that the sentences for certain of the offenses of which he was found guilty should run consecutive to each other offends *Apprendi* and *Blakely* and, for that reason too, the matter must be remanded for further proceedings. We do not agree because

the rule of *Apprendi* and *Blakely* does not apply to our state's consecutive sentencing scheme.

Section 669 imposes an affirmative duty on a sentencing court to determine whether the terms of imprisonment for multiple offenses are to be served concurrently or consecutively. (*In re Calhoun* (1976) 17 Cal.3d 75, 80-81.) However, that section leaves this decision to the court's discretion. (*People v. Jenkins* (1995) 10 Cal.4th 234, 255-256.) "While there is a statutory presumption in favor of the middle term as the sentence for an offense [citation], there is no comparable statutory presumption in favor of concurrent rather than consecutive sentences for multiple offenses except where consecutive sentencing is statutorily required. The trial court is required to determine whether a sentence shall be consecutive or concurrent but is not required to presume in favor of concurrent sentencing." (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.)

Section 669 provides that upon the sentencing court's failure to determine whether multiple sentences shall run concurrently or consecutively, then the terms shall run concurrently. This provision reflects the Legislature's policy of "speedy dispatch and certainty" of criminal judgments and the sensible notion that a defendant should not be required to serve a sentence that has not been imposed by a court. (See *In re Calhoun, supra*, 17 Cal.3d at p. 82.) This provision does not relieve a sentencing court of the affirmative duty to determine whether sentences for multiple crimes should be served concurrently or consecutively. (*Ibid.*) And it does not create a presumption or other entitlement to concurrent sentencing. Under section 669, a defendant convicted of multiple

offenses is entitled to the exercise of the sentencing court's discretion, but is not entitled to a particular result.

The sentencing court is required to state reasons for its sentencing choices, including a decision to impose consecutive sentences. (Cal. Rules of Court, rule 4.406(b)(5); *People v. Walker* (1978) 83 Cal.App.3d 619, 622.) This requirement ensures that the sentencing judge analyzes the problem and recognizes the grounds for the decision, assists meaningful appellate review, and enhances public confidence in the system by showing sentencing decisions are careful, reasoned, and equitable. (*People v. Martin* (1986) 42 Cal.3d 437, 449-450.) But the requirement that reasons for a sentence choice be stated *does not create a presumption or entitlement to a particular result*. (See *In re Podesto* (1976) 15 Cal.3d 921, 937.)

Therefore, entrusting to trial courts the decision whether to impose concurrent or consecutive sentencing under our sentencing laws is not precluded by the decision in *Blakely.* In this state, every person who commits multiple crimes knows that he or she is risking consecutive sentencing. While such a person has the right to the exercise of the trial court's discretion, the person does not have a legal right to concurrent sentencing, and as the Supreme Court said in *Blakely*, "that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned." (*Blakely, supra,* 542 U.S. at p. ___ [159 L.Ed.2d at p. 417].)

Accordingly, the rule of *Apprendi* and *Blakely* does not apply to California's consecutive sentencing scheme. There was no error.

DISPOSITION

The judgment is affirmed.

HULL, J.

I concur:

RAYE, Acting P.J.

I concur except as to Part III.A. of the Discussion in which I concur in the result.

ROBIE, J.